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No. 84-1162

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

BURLINGTON NORTHERN RAILROAD COMPANY,
Petitioner,

v.

GAIL L. CLAY, INDIVIDUALLY, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF NORMAN LEE CLAY, AND AS GUARDIAN OF KARI LYNN CLAY AND BOYD LEE CLAY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Respondent, Gail L. Clay, opposes the Petition for a Writ of Certiorari to review the decision of the Tenth Circuit Court of Appeals dismissing the within appeal for lack of jurisdiction.

STATEMENT OF THE CASE

The Respondent accepts the Petitioner's statement of the case with the addition that as of March 29, 1984, Respondent's motions to amend the judgment with respect to pre-judgment and post-judgment interest, filed pursuant to

Fed. R. Civ. P. 59, were still pending before the trial court. See *Order* (filed March 29, 1984) attached hereto as an Appendix. Note also that the Petitioner's transcription of the trial court's Order of November 14, 1983 concerning the perjured trial testimony of Petitioner's employees is in error. The first sentence of the second paragraph at App. 9 of the *Petition for Writ of Certiorari* reads as follows:

> "Furthermore, I find and conclude that Cuccia's testimony was *not* the most critical testimony in the case on the issue of the railroad's negligence." (Emphasis supplied)

The order as signed by the Court actually says:

> "Furthermore, I find and conclude that Cuccia's testimony was the most critical testimony in the case on the issue of the railroad's negligence."

REASONS FOR DENYING THE WRIT

THE DISMISSAL OF PETITIONER"S PREMATURE APPEAL FOR FAILURE TO FILE A NEW NOTICE OF APPEAL AFTER THE DISTRICT COURT'S CERTIFICATION OF AN INTERLOCUTORY APPEAL WAS PROPER UNDER THIS COURT'S DECISION IN *GRIGGS V. PROVIDENT CONSUMER DISCOUNT CO.*, 459 US 56, 74 L Ed 2d 225, 103 S CT 400 (1982), AND RULES 3 AND 4(a) (4) OF THE FEDERAL RULES OF APPELLATE PROCEDURE. THERE ARE NO SIGNIFICANT OR COMPELLING ISSUES CONTAINED HEREIN JUSTIFYING THE INTERVENTION OF THE SUPREME COURT.

The Federal Rules of Appellate Procedure require an appellant, who has prematurely filed a notice of appeal, to file another notice of appeal within thirty (30) days of a final order certified under Rule 54(b) of the Federal Rules of Civil

Procedure. *Fed. R. App. P.*, 4(a) (4).

The trial court's final order of March 29, 1984, on its face, reflects the pendency and determination of two motions filed by the Respondent under *Fed. R. Civ. P.* 59 to amend the judgment to provide for pre-judgment interest and to relate post-judgment interest on the amended judgment back to the date of the initial judgment entered June 10, 1983.

> "In this Federal Employer's Liability Act case, several post-trial motions are pending with regard to the judgment entered in favor of the plaintiff Gail Clay against the defendant Burlington Northern Railroad Company. These motions have been thoroughly briefed, and oral argument would not materially assist in deciding them.
>
> Plaintiff has requested that I award prejudgment interest, but has cited no persuasive authority supporting such an award. For this reason, I decline to award her pre-judgment interest. That motion is denied.
>
> Plaintiff also has requested that I award post-judgment interest on the full amount of the amended judgment from the date the original judgment was entered." *Order*, March 29, 1984. (See complete text in Appendix).

Where a timely motion is filed in the district court by any party under *Fed. R. Civ. P.* 59, to alter or amend the judgment, the time for appeal for all parties shall run from the entry of the order granting or denying the motion. *Fed. R. App. P.* 4(a) (4). The rules leave no ambiguity as to the necessity of filing a new notice of appeal.

> "A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time

measured from the entry of the order disposing of the motion as provided above." Fed. R. App. P. 4(a) (4).

In *Griggs v. Provident Consumer Discount Co.*, 459 US 56, 74 L Ed 2d 225, 103 S Ct 400 (1982), this court explained the effect of the 1979 amendments to *Fed R. App. P.* 4 and underscored the necessity of filing a new notice of appeal.

> "Professor Moore has aptly described the post-1979 effect of a Rule 59 motion on a previously filed notice of appeal: 'The appeal simply self destructs'. . . ."
>
> * * *
>
> "The notice of appeal filed in this case . . . was not merely defective; it was a nullity. Under the plain language of the current Rule, a premature notice of appeal 'shall have no effect'; a new notice of appeal 'must be filed!' *In short, it is as if no notice of appeal were filed at all. And if no notice of appeal is filed at all, the Court of Appeals lacks jurisdiction to act.*" *Griggs v. Provident Consumer Discount Co., supra,* at 61 (Emphasis supplied and citations omitted).

The Petitioner's alternative argument that its "*Memorandum Brief in Opposition to Summary Dismissal*" (See *Petition for Writ of Certiorari*, App. 22), should be construed as a notice of appeal, if accepted, would confuse and encumber the mechanics of appeal precisely delineated in the 1979 amendments to the Federal Rules of Appellate Procedure. The Memorandum filed in the Court of Appeals by the Petitioner was a response to an order to show cause and could not reasonably have been construed as serving the function of a notice of appeal. Petitioner's Memorandum was filed in the Court of Appeals rather than the district court, and there was no transmittal of it to the Clerk of the District Court as required by *Fed R. App. P.* 4(a) (1). The Clerk of the District Court did not "transmit forthwith" copies of the

notice of appeal and the docket entries to the Clerk of the Court of Appeals named in the notice to effectuate the transition in jurisdiction. The Memorandum went well beyond "informality of form or title". It expressed no present intent to appeal the final order of the District Court and failed to designate which, of several orders or judgments, it intended to appeal. It merely advised the Court of Appeals that a certification of the final order had been entered by the District Court and requested that the court not dismiss its previous appeal of the November 19, 1983 order. Memoranda and correspondence which connote no more than normal developments in the course of processing a premature appeal cannot be characterized as equivalent to a timely notice of appeal. *Van Wyk El Paso Investment, Inc. v. Dollar Rent-a-Car Systems, Inc.*, 719 F.2d 806 (5th Cir. 1983); See also *Florida Women's Medical Clinic, Inc. v. Smith*, 706 F.2d 1172 (11th Cir. 1983).

CONCLUSION

The Petitioner is an enormous company with sophisticated counsel. The requirements for effecting an orderly transfer of jurisdiction from the District Court to the Court of Appeals were or should have been known to it. The 1979 amendments to the Federal Rules of Civil Procedure and the opinion of this Court in *Griggs, supra*, cannot be made more explicit.

There are no novel or significant issues framed in this case justifying review by this Court or further delay for the Respondent and her children. It is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

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APPENDIX

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Civic Action No. 81-C-1385

CHARLOTTE LOUISE WILSON, *et al*,

Plaintiffs,

v.

BURLINGTON NORTHERN RAILROAD COMPANY,

Defendant

ORDER

(Filed March 29, 1984)

In this Federal Employer's Liability Act case, several post-trial motions are pending with regard to the judgment entered in favor of the plaintiff Gail Clay against the defendant Burlington Northern Railroad Company. These motions have been thoroughly briefed, and oral argument would not materially assist in deciding them.

Plaintiff has requested that I award pre-judgment interest, but has cited no persuasive authority supporting such an award. For this reason, I decline to award her pre-judgment interest. That motion is denied.

Plaintiff also has requested that I award post-judgment interest on the full amount of the amended judgment from the date the original judgment was entered. Defendant objects to this proposed award. Since my decision to amend the judgment simply removed the effect of the comparative negligence diminution of Clay's award, it held that she is entitled to the full

amount of damages found by the jury. Post-judgment interest should accrue on the full amount of $690,046.00 from the date of the initial judgment, June 10, 1983. My order dated November 14, 1983, which restored the full amount of the jury verdict, should have indicated that the amended judgment be entered *nunc pro tunc* to June 10, 1983. Pursuant to Fed. R. Civ. P 60(a), I now order that the judgment entered November 15, 1983 be amended to reflect that such judgment was to be effective *nunc pro tunc* to June 10, 1983.

Therefore, the Clerk of the Court shall enter an amended judgment in favor of the plaintiff Clay and against the defendant in the amount of $690,046.00, *nunc pro tunc* to June 10, 1983. Interest at the applicable rate shall accrue from June 10, 1983 on the full amount of the judgment.

Plaintiff also has requested that I require that any supersedeas bond filed by the defendant in support of a Fed. R. Civ. P. 62(d) stay be in an amount sufficient to cover the full amount of the judgment as well as any interest awarded. Of course, under Rule 62(d) no stay is effective until I approve the bond. In order to expedite matters, I will now state that I will not approve any supersedeas bond unless it is sufficient to secure the full amount of the $690,046.00 judgment, plus interest at the statutory rate from June 10, 1983 until March 31, 1986. The Court of Appeals' crowded docket, together with recent statements by the Chief Justice of the United States describing the increasing work load of the Courts of Appeals, indicate that the prudent course is to estimate two years on appeal.

Finally, the parties have submitted cross-motions for Fed. R. Civ. P. 54(b) certification of the plaintiff Clay's judgment against the defendant. Pursuant to that rule, I find that there is no just reason for delay and I direct the Clerk of the Court to enter as a final judgment the amended judgment specified in this order. The parties may pursue an appeal from this final amended judgment.

Dated at Denver, Colorado, March 29, 1984.

BY THE COURT:
/s/ Jim R. Carrigan
JUDGE UNITED STATES
DISTRICT COURT